STATE OF MICHIGAN

COURT OF APPEALS

MARCELO ORTIZ and CARRIE ORTIZ, Individually and as Next Friend of NAIYA ORTIZ,

Plaintiffs-Appellees,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellant,

and

E.J.H. CONSTRUCTION, INC.,

Defendant.

UNPUBLISHED
April 6, 2006

No. 254777
Wayne Circuit Court
LC No. 02-213661-CK

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM

Defendant, Allstate Insurance Company,[1] appeals by leave granted the trial court's denial of its motion for summary disposition with regard to plaintiffs' breach of contract claim. After oral argument, this Court ordered the parties to submit supplemental briefs relevant to the exception to the paragraph 6 exclusion within the policy. After contemplation of the thoughtful briefs and arguments submitted by the litigants, we conclude the trial court erroneously construed the insurance contract. Defendant is entitled to judgment as a matter of law. We reverse.

I. Basic Facts And Procedure

In April, 2000, a fire occurred in the attic of plaintiffs' Allen Park house. As a result of fire suppression methods by the Allen Park Fire Department, the house suffered extensive water

[1] Because E.J.H. Construction, Inc., is not a party to this appeal, use of the word "defendant" refers to Allstate Insurance Company.

damage and, plaintiffs claim, caused mold to grow where insulation and other building materials were not properly dried before reconstruction was complete.

Plaintiffs filed their complaint in April, 2002, alleging breach of contract, violations of Michigan's Uniform Trade Practices Act (UTPA), and gross negligence against defendant; plaintiffs also alleged negligence and violations of Michigan's Consumer Protection Act against EJH. Plaintiffs alleged that defendant was responsible under the terms of the insurance policy for the mold damage and for plaintiffs' personal injuries resulting from their exposure to the mold.

Defendant then filed its motion for summary disposition, arguing that plaintiffs' claims should be dismissed because the insurance policy excluded coverage of mold.[2] Plaintiffs responded that the exclusion was inapplicable where the mold was caused by a covered loss and that there existed a genuine issue of material fact as to whether the mold was caused by the water used to extinguish the fire.

The court dismissed plaintiffs' UTPA claim, and plaintiffs agreed to dismiss their gross negligence claim.[3] The trial court, though, denied defendant's motion with respect to plaintiffs' breach of contract claim, finding a genuine issue if material fact existed as to whether the mold was caused by the fire suppression methods. This appeal followed.

II. Analysis

On appeal, defendant argues that the trial court erred by finding its homeowners insurance contract ambiguous with respect to the exclusion for mold damage caused by a covered water loss. We agree with defendant that the contract is unambiguous as it relates to the mold exclusion.

A. Standard of Review

This Court reviews a trial court's determination regarding a motion for summary disposition de novo. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). The construction and interpretation of an insurance policy and whether an ambiguity remains for the factfinder are questions of law that are also reviewed de novo on appeal. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Auto-Owners Ins Co, v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999). "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in [the] light

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[2] Notably, defendant revised its policy language in April, 2002 to "completely exclude coverage for loss to property caused by or consisting of mold . . . ." However, the policy nonetheless "provides that Allstate will only pay up to $5,000 for mold . . . remediation in the event of a water loss covered by your homeowners policy."

[3] The trial court's dismissal of plaintiffs' UTPA claim is not an issue on appeal.

most favorable to the nonmoving party to decide whether a genuine issue of material fact exists." *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001). Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law. *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

B. Applicability of Exclusions §15(d) and § 23 of the Policy[4]

It is uncontested that the fire and water damage to plaintiffs' home was a covered loss and paid by defendant. We first address whether the insurance policy excludes mold damage caused by a covered loss under two exclusions: § 15(d) and § 23.

"Interpretation of an insurance policy ultimately requires a two-step inquiry: first, a determination of coverage according to the general insurance agreement and, second, a decision regarding whether an exclusion applies to negate coverage. This Court has held that an insurance policy provision is valid 'as long as it is clear, unambiguous and not in contravention of public policy.'" *Auto-Owners Ins Co v Harrington*, 455 Mich 377, 382; 565 NW2d 839 (1997) (citations omitted).

"An insurance policy is an agreement between parties that a court interprets 'much the same as any other contract' to best effectuate the intent of the parties and the clear, unambiguous language of the policy." *Harrington, supra* at 381, quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566; 489 NW2d 431 (1992). Thus, "the court looks to the contract as a whole and gives meaning to all its terms." *Harrington, supra* at 381. An unambiguous contract must be construed according to its plain and ordinary meaning. *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). An insurance contract is ambiguous if, after reading the entire contract, its language can reasonably be understood in different ways. *Farm Bureau Mutual Ins Co v Nikkel*, 460 Mich 558; 596 NW2d 915 (1999).

Plaintiffs contend the mold was caused by water used to suppress the fire. Defendant denies the mold is related to the fire suppression, but nonetheless argues that the mold damage is excluded, no matter what caused it to occur. In this regard, the insurer bears the burden of establishing that an exclusion applies. *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 160; 534 NW2d 502 (1995). Exclusions are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). However, an insurer

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[4] As a threshold matter, we hold as erroneous the trial court's ruling that two versions of defendant's policy could apply in this case, n 2, *supra*. Indeed, the "new" policy, which contained a revised mold exclusion, did not take effect until after plaintiffs discovered the mold. The record is devoid of any argument or evidence that coverage is warranted under the "new" policy. It is without dispute that the "insured bears the burden of proving coverage." *Heniser v Frankenmuth Mut Ins*, 449 Mich 155, 160; 534 NW2d 502 (1995). That stated, the only possible coverage is under the "old" policy, if no exclusions exist to bar coverage.

"will not be held responsible for a risk that it did not assume." *Allstate Ins Co v Fick*, 226 Mich App 197, 201; 572 NW2d 265 (1997). If any exclusion in an insurance policy applies to a claimant's particular claims, coverage is lost. *South Macomb Disposal Auth v American Ins Co*, 225 Mich App 635, 654; 572 NW2d 686 (1997).

Moreover, exclusions are not to be read cumulatively. Rather, each exclusion is to be read in conjunction with the insurance agreement but independently of other exclusions. *Hawkeye-Security Ins Co v Vector Constr Co*, 185 Mich App 369, 384-385; 460 NW2d 329 (1990). Thus, where one exclusion precludes recovery for a loss and another exclusion contains an exception to that exclusion that would provide coverage for the loss, the loss would not be recoverable due to the former exclusion. *Id*.

Defendant argues that the subsequent mold damage, even if caused by the water damage in April 2000, is excluded under 15(d). Exclusion 15 provides in pertinent part:

> Losses We Do Not Cover Under Coverages A and B:
>
> * * *
>
> [W]e do not cover loss consisting of or caused by any of the following:
>
> * * *
>
> 15 (d) rust or other corrosion, mold, wet or dry rot;

This provision clearly and unambiguously excludes mold from being a covered loss.

Plaintiff maintains, however, that the coverage is saved by exclusion 23. That section provides:

> We do not cover loss to covered property described in Coverage A – Dwelling Protection or Coverage B – Other Structures Protection when:
>
> (a) there are two or more causes of loss to the covered property; and
>
> (b) the predominant cause(s) of loss is (are) excluded under Losses We Do Not Cover, items 1 through 22 above.

Exclusion 23 does not state what the insurance policy will cover. To the contrary, it is an exclusion that further limits coverage. The predominant cause of loss in this case was fire – a covered loss. The exclusion limits coverage where the predominant cause of loss is not a covered loss. In other words, Section 23 excludes coverage where there are two causes of loss and the predominant cause is not a covered loss. In this case, the predominant cause (fire) was a covered loss, so plaintiffs cannot rely on Section 23 to save their claim.

This result was also reached by this Court in *Hayley v Allstate Insurance Co*, 262 Mich App 571; 686 NW2d 273 (2004), which construed the policy at issue here today. In *Hayley*, the insureds' home sustained flooding damage caused by ice damming on the roof. *Id.* at 572. The defendant insurer paid the insureds' claim. *Id.* Although the problem appeared to be resolved, the insureds discovered toxic mold growing in their ceiling one year later. *Id.* at 573. They

alleged that the mold was caused by the water damage from one year earlier, and requested that the defendant reopen their claim to cover the cost of the mold removal. The defendant refused to pay for any claim for mold damage. *Id.* at 573. The plaintiffs filed an action against the defendant.

The *Hayley* Court explicitly rejected the plaintiffs' argument that exclusions15(d) and 23 were ambiguous. Rather, this Court held that 15(d) "clearly excludes both losses caused by mold and losses consisting of mold damage" and thus reversed the trial court's decision denying the defendant's motion for summary disposition. *Id.* at 575-576. The Court further concluded that because exclusion 23 was an exclusion to coverage, it could not create coverage that did not otherwise exist. Thus, plaintiffs' arguments with respect to exclusions 15(d) and 23 were rejected in *Hayley*.

C. Coverage Under the Building Structure Reimbursement Clause

Plaintiffs alternatively argue, and the trial court agreed, that under the "Building Structure Reimbursement" clause, mold caused by a covered loss (i.e., water damage) is covered, notwithstanding exclusion 15(d). We disagree. The "Building Structure Reimbursement" clause provides in pertinent part:

> 6. **How We Pay For A Loss**
>
> Under **Coverage A – Dwelling Protection and Coverage B – Other Structures Protection** and **Coverage C – Personal Property Protection**, payment for covered loss will be by one or more of the following methods:
>
> * * *
>
> (c) Building Structure Reimbursement.
>
> **Under Coverage A – Dwelling Protection** and **Coverage B – Other Structures Protection**, we will make additional payment to reimburse you for cost in excess of actual cash value if you repair, rebuild or replace damaged, destroyed or stolen covered property within 180 days of the actual cash value payment. This additional payment includes the reasonable and necessary expense for treatment or removal and disposal of contaminants, toxins, or pollutants as required to complete repair or replacement of that part of a building structure(s) damaged by a covered loss.

Plaintiffs argue that mold is synonymous with, or qualifies as "contaminants, toxins, or pollutants" and thus mold damage is covered under this clause. Defendant, however, correctly argues that the clause clearly limits coverage to "payment for covered loss" and thus mold damage remains excluded.

It is fundamental that courts must give effect to every word, phrase and clause in a contract and avoid an interpretation that renders any part of the contract surplusage or nugatory. *Klapp, supra* at 468. Where the policy is clear, this Court is bound by the specific language in the policy. *Michigan Township Participating Plan v Pavolich*, 232 Mich App 378, 382; 591

NW2d 325 (1998). Because the mold damage is not a "covered loss" under the terms of the policy, payment under the Building Structure Reimbursement provision is not triggered.

In order to reach the conclusion advocated by plaintiffs and accepted by the trial court, this Court would ignore the clear language of the clause that limits payment to a "covered loss." By erasing "covered loss" from the policy, the trial court essentially rewrote the terms of the insurance policy. Clear and unambiguous language may not be rewritten under the guise of interpretation. *South Macomb Disposal Auth, supra* at 653. Thus, the Building Structure Reimbursement clause does not create coverage.

C. Applicability of Exclusion ¶ 6

As noted, the parties were ordered by this Court to submit supplemental briefs as to the applicability, if any, of the policy's exception to exclusion 6. Specifically, under Losses We Do Not Cover Under Coverages A and B:

> We do not cover loss to the property described in Coverage A – Dwelling Protection or Coverage B – Other Structures Protection consisting of or caused by:
>
> * * *
>
> ¶6 Enforcement of building codes, ordinances or laws regulating the construction, reconstruction, maintenance, repair, placement or demolition of any building structure or other land at the residence premises, except as specifically provided in Section I, Additional Protection under Item 10 – "Building Codes."
>
> We do cover sudden and accidental direct physical loss caused by actions of civil authority to prevent the spread of fire.

Plaintiffs' claim fares no better under this provision. Mold is expressly not covered under exclusion 15(d). This exclusion precludes recovery for all mold damage, regardless of the cause of the mold. *Hawkeye*, supra.

While we are sympathetic to plaintiffs' plight, we note that plaintiffs were placed on notice that the method of repairing the premises was deficient and plaintiffs nonetheless waited for these deficiencies to exacerbate themselves into a condition clearly excluded under the policy. Once the general contractor, plaintiffs' agent, put plaintiffs on notice that the method to dry the premises authorized by the insurer was insufficient to properly dry the house, their proper course of action should have been to either pay whatever costs were necessary to rent the additional dehumidifiers and fans needed to properly dry the house and then pursue the insurer for repayment of the additional costs or immediately institute an action against the insurer for enforcement of the insurance contract. To the extent the general contractor warranted or otherwise assured the plaintiffs that the method of drying the water from the premises that was authorized by the insurer was sufficient, then plaintiffs have a claim of negligence against the general contractor.

III. Conclusion

Plaintiffs cannot overcome the exclusionary language set forth in the policy. Without coverage, there is no basis for plaintiffs' breach of contract action. The trial court erred in denying defendant's motion for summary disposition in this regard.

Reversed and remanded for entry of judgment consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly